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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972-73

No. 72-1568

STATE OF NEW JERSEY and SUPERINTENDENT OF THE NEW JERSEY STATE PRISON AT RAHWAY, NEW JERSEY,

Petitioners,

-vs-

ARTHUR WRIGHT, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOSEPH P. LORDI
ESSEX COUNTY PROSECUTOR
ESSEX COUNTY COURTS BUILDING
NEWARK, NEW JERSEY 07102

R. BENJAMIN COHEN
ASSISTANT PROSECUTOR
Of Counsel for Petitioner

SARA A. FRIEDMAN
ASSISTANT PROSECUTOR
On the Brief

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972-73

No.

STATE OF NEW JERSEY and SUPERINTENDENT OF THE NEW JERSEY STATE PRISON AT RAHWAY, NEW JERSEY,

Petitioners,

-vs-

ARTHUR WRIGHT, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, State of New Jersey and Superintendent of Rahway State Prison respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 1, 1973, affirming the December 23, 1971, order of the United States District Court for the District of New Jersey.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the United States District Court for the District of New Jersey, as well as the Report and Recommendation of United States Magistrate John W. Devine, also appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on March 1, 1973. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 *U.S.C.* S 1254(1).

QUESTIONS PRESENTED

1. Does a state prisoner waive his right to challenge the sufficiency of an affidavit for a search warrant in federal habeas corpus proceedings if he fails inexcusably to raise the issue of probable cause in a state trial court?

2. Where an affidavit for a search warrant is marginally sufficient to establish probable cause, should the interest of public justice prevail over the interest of an individual to be free from governmental intrusion into his privacy?

3. Was the instant search and seizure lawful as being incidental to a lawful arrest of respondent for a disorderly persons offense?

STATEMENT OF THE CASE

On October 30, 1968, a search warrant for "the premises of Arthur Wright, Elsie Sampson" was issued by a Newark Municipal Judge and executed by members of the Newark Police Department. As a result of this, Mr. Wright and Miss Sampson were jointly indicted for unlawful possession of heroin (Indictment No. 971-68) and methadone (Indictment No. 972-68) contrary to the provisions of *N.J.S.* 24:18-4.

This case is primarily concerned with the respondent's failure to tender the issue of probable cause to the state trial court in arguing that a motion to suppress evidence should be granted. It is the State's position that this failure, under the unique circumstances of this case, was inexcusable on respondent's part, thereby resulting in a valid waiver of the probable cause issue in state appellate and federal court proceedings. Respondent's inexcusable neglect is demonstrated by facts below stated.

The Office of the Public Defender entered an appearance of counsel in respondent's behalf on January 31, 1969. On February 6, 1969 Mr. Wright having been arrested on a bench warrant, was released in his own custody by an Essex County Court judge. He received a copy of the indictments and entered a plea of not guilty on February 17, 1969. On August 13, 1969, after having been arrested on a second bench warrant, respondent was released on bail.

A Notice of Motion to suppress evidence was served and filed by the Public Defender on behalf of co-defendant Sampson on September 9, 1969. On September 24, 1969, Charles Grossman, Esq., was substituted as counsel for respondent, and on that same datte, the hearing on Miss Sampson's motion commenced. Mr. Wright, on application by Mr. Grossman, was permitted to join in his co-defendant's motion. So the respondent was permitted to raise any issue relating to the search and seizure in question even though he was technically out of time under a state procedural court rule. R. 3:5-7 (a).[1] The court on September 25,

[1] *R*3:5-7. Motion for Return of Property and To Suppress Evidence

(a) Notice; Time; Hearing; Briefs. On notice to the prosecutor of the county in which the matter is pending or threatened and to the applicant for the warrant, if the search was with a warrant, and in accordance with the applicable provisions of *R*.1:6-3 and *R*.3:10, a person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the evidence obtained may be used against him in a penal proceeding, may apply only to the Superior Court or county court of the county in which the evidence was obtained for the return of property seized and to suppress the evidence obtained, even though the offense charged or to be charged may be within the jurisdiction of a municipal court. A brief stating the facts and the arguments in support of the motion shall be submitted with the notice of motion. If material facts are disputed, testimony thereon shall be taken in open court. Such motion shall be made within 30 days after the initial plea to the charge unless, the court, for good cause shown, enlarges the time. A motion made before trial shall be determined before the trial. The motion may be made after trial has commenced only if the trial court finds that defendant could not reasonably have made it prior thereto.

(b) Return of Property . . .

(c) Consequences of Failure to Move. If a timely motion is not made in accordance with this rule, the defendant shall be deemed to have waived any objection during trial to the admission of evidence on the ground that such evidence was unlawfully obtained.

(d) Effect of Irregularity in Warrant. In the absence of bad faith, no search or seizure made with a search warrant shall be deemed unlawful because of technical insufficiencies or irregularities in the warrant or in the papers or proceedings to obtain it, or in its execution.

1969, upheld the validity of the search and seizure in question.

The only issue presented at the motion hearing was whether or not the search warrant was validly executed. Respondent's counsel specifically stated he was not attacking the sufficiency of the affidavit.

> . . . (I)n this situation let's assume, and we have to assume since the affidavit isn't being attacked, that there was a valid search warrant and there were grounds for a search warrant, at least to make a search . . . (T1.51-24 to T1.52-3).[2]

In fact, during the elicitation of testimony at the motion hearing, co-counsel objected to the State's inquiry if the warrant were obtained pursuant to police surveillances. Co-counsel stated, ". . . (T)here is no question as to what it was based on. We are not attacking that" (T1.8-19 to 23).

In its oral opinion (T1.62-11 to T1.67-4), the court found that the only issue on the motion was whether the mistake in the search warrant, which set forth the designated apartment as number 8 instead of number 7, rendered the search illegal. It found that it had no such effect and that the search was valid. The court also stated, without explanation and probably referring to defense counsels' comments, that probable cause existed for the issuance of the search warrant.

Co-defendant Sampson pleaded guilty to possession of methadone, and respondent proceeded to trial alone on October 7-9, 1969. He was found guilty of possession of heroin and not guilty of possession of methadone. Never once at trial did respondent attempt to introduce the issue of probable cause or to again relax the procedural court rule to permit an out of time objection. Mr. Wright was sentenced on November 12, 1969, to serve a term of not less than three nor more than five years in New Jersey State Prison and to pay a fine of $25.00. His conviction was affirmed on January 21, 1971, by the New Jersey Superior Court, Appellate Division, reported as *State v. Wright*, 113 *N.J. Super.* 79 (App. Div. 1971), and certification was subsequently denied by the New Jersey Supreme Court, 58 *N.J.* 164 (1971).

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[2]T1—Motion Transcript of September 24, 1969.

Mr. Wright filed a *pro se* petition for a writ of habeas corpus *in forma pauperis* with the United States District Court (Civil No. 893-71), and said writ was granted. The federal court found that respondent's counsel at trial had been lately assigned and had "understandably" assumed the existence of probable cause. Even though alleged unpreparedness of counsel was never raised as an issue in any state court proceeding, the federal lower court assumed this unpreparedness as a fact and held that the respondent had not waived his right to argue the sufficiency of the affidavit in question.

The petitioners appealed the granting of the writ of habeas corpus to the United States Court of Appeals for the Third Circuit. At this time the Office of the Public Defender reentered the case as defense counsel. At oral argument before the Court of Appeals on February 6, 1973, the parties were restricted to two issues, waiver and search incident to a lawful arrest. On March 1, 1973, the reviewing court affirmed the order of the district court.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW BLATANTLY FRUSTRATES THE THEORY OF COMITY BETWEEN STATE AND FEDERAL JURISDICTIONS

This Court has determined that a federal court should exercise its discretion to deny habeas corpus relief where a litigant has failed to comply with legitimate state practice rules. *Fay v. Noia*, 372 *U.S.* 391, 433, 439, 83 *S. Ct.* 822, 9 *L. Ed. 2d* 837 *(1963)* . . . (C)onsiderations of comity . . . prompted the refusal of relief to one who had inexcusably failed to tender the federal questions to the state courts." 372 *U.S.* at 425.

The issues raised in the trial court below relating to search and seizure were insubstantial and failed to focus on probable cause. Consequently, the prosecution had no practical opportunity to litigate the sufficiency of the search warrant affidavit or to argue alternatively that the seizure was the valid result of a search incident to a lawful arrest. Plainly, petitioners have a legitimate interest in requiring that, where possible, constitutional objections to the admission of evidence be made prior to the completion of a trial. *Henry v. Mississippi*, 379 *U.S.* 443, 447-449, 85 *S. Ct.* 564, 13 *L. Ed. 2d* 408 (1965), reh. den. 380 *U.S.* 926 (1965). Here, and because of no failing on the part of the prosecution or the trial court, the respondent's inaction caused

the motion and the trial to proceed to their conclusions without any informed decision having been made on the probable cause question.

Petitioners emphasize that state court rule *R.* 3:5-7 (requiring that motions to suppress evidence be made within thirty days after the initial plea) is not specifically in issue. That rule was relaxed in respondent's favor when he was allowed to join in his co-defendant's motion. Moreover, under *R.* 3:5-7(a) a state trial court has discretion to allow the motion to be made after trial has commenced if "the trial court finds that defendant could not reasonably have made it prior thereto." What really is in issue is the respondent's failure to raise the probable cause issue before or during his trial, relying instead on the presentation of the matter for the first time to a state appellate tribunal. It should be noted that the trial below occurred thirteen days after the motion hearing, and defense counsel still never raised the probable cause question at trial.

By-passing a trial court on substantive, relevant issues is not condoned by the New Jersey courts. *R.* 2:10-2.[3] The State has an interest in the trial court's disposition of motions to suppress, for if evidence is to be excluded the prosecution must either develop and use other available evidence or clear the trial calendar by dismissing the indictment. *State v. McKnight*, 52 *N.J.* 35, 48 (1968), 243 *A.* 2*d* 240; *State v. Raymond*, 95 *N.J. Super.* 175, 181 (App. Div. 1967), 230 *A.* 2*d* 404 *certif.* den. 50 *N.J.* 296 (1967), 234 *A.* 2*d* 403. Early disposition would also avoid the involvement of collateral issues during the course of a criminal trial. *State v. Wade*, 89 *N.J. Super.* 139, 147 (App. Div. 1965), 214 *A.* 2*d* 411; *State v. Perry*, 59 *N.J.* 383, 387 (1971), 283 *A.* 2*d* 330; *State v. Broxton*, 49 *N.J.* 373, 388 (1967), 230 *A.* 2*d* 489; *State v. Jordan*, 115 *N.J. Super.* 73 (App. Div. 1971), 278 *A.* 2*d* 223. See also *People of Guam v. Cruz*, 415 *F.* 2*d* 336, 338 (9 Cir. 1969).

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[3] *R.* 2:10-2 Notice of Trial Errors

Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court.

Order in the state judicial process is a necessary component of effective law enforcement. While federal courts may not always recognize finality in state court judgments, *Townsend v. Sain*, 372 *U.S.* 293, 83 *S. Ct.* 745, 9 *L. Ed.* 2*d* 770 (1963); *Fay v. Noia, supra*, where "the State's insistence on compliance with its procedural rule serves a legitimate state interest," its contravention may bar vindication of federal rights. *Henry v. Mississippi*, 379 *U.S.* 443, 85 *S. Ct.* 564, 13 *L. Ed.* 2*d* 408, 413 (1965). The State's insistence that suppression of evidence matters be first presented to a trial court serves a legitimate state interest. Respondent in the instant case was deemed to have waived his constitutional rights by the New Jersey Superior Court, and this judgment should have been accorded finality by the federal courts.

The burden was on Mr. Wright to establish the absence of an effective waiver. *Cf. Johnson v. Zerbst*, 304 *U.S.* 458 468, 58 *S. Ct.* 1019, 82 *L. Ed* 1461, 1469 (1938). He failed to sustain this burden in any way. He had institutional representation for eight or nine months prior to the motion hearing. *Moore v. United States*, 432 *F.* 2*d* 730 (3rd Cir. 1970). Never was the Public Defender's file introduced in any court proceeding to demonstrate lack of preparation or inaccessibility of defense records to the assigned counsel.

Mr. Wright's argument, and the district court's acceptance of it, that trial counsel's lack of preparation accounted for his failure to raise the matter of probable cause is totally unfounded. Unpreparedness of counsel, which was never raised in any state court proceeding, is an illusory issue at best. If the failure to challenge the sufficiency of the affidavit were attributable to something other than an honest, considered judgment at the time of the hearing and trial that probable cause existed, the only other cause could have been respondent's inexcusable neglect. Respondent had prior criminal experience, was personally served with a search warrant eleven months prior to his first contact with assigned counsel, was accepted as a client by the Public Defender seven months prior to that time, received copies of the indictments at the time of his pleas, and was at liberty throughout most of the pre-trial proceedings. Any alleged shortage of time in which assigned counsel had to prepare would have been directly caused by respondent's own unjustified lack of diligence.

The federal courts erred in granting habeas corpus relief to Mr. Wright and acted in disregard of legitimate state interests. Respondent should have been deemed to have waived his constitutional right.

2. NO POLICY OF DETERRING INSOLENCE IN OFFICE WOULD BE FOSTERED BY SUPPRESSING EVIDENCE IN THIS CASE.

Mapp v. Ohio, 367 *U.S.* 643, 81 *S. Ct.* 1684, 6 *L. Ed* 2*d* 1081, 1089-90 (1961) instructed:

> Today we once again examine Wolf's constitutional documentation of the right to privacy free from unreasonable state introsuion, and, after its dozen years on our books are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by the same authority, inadmissible in a state court.

The policy of suppression was obviously aimed at curbing "official lawlessness" or insolence in office. This has long been recognized by the New Jersey Supreme Court. See *State v. DeSimone, 60 N.J. 319 (1972), 288 A. 2d 849; State v. Bisaccia*, 58 *N.J.* 586 (1971), 279 *A.* 2*d* 675; *State v. Zito*, 54 *N.J.* 206 (1969), 254 *A.* 2*d* 769; *State v. Gerardo*, 53 *N.J.* 261 (1969); 250 *A. 2d 130; State v. Kasabucki, 52 N.J. 110 (1968), 244 A. 2d* 101; *State v. Smith*, 37 *N.J.* 481 (1962), 181 *A.* 2*d* 761.

To the extent that *Mapp* has been interpreted to require suppression of evidence even where a policeman and a magistrate have not exhibited any insolence, it is submitted that its underlying philosophy has been violated. While the affidavit in this case might appear to be marginal, the search warrant should be given legal validity due to the absence of official misconduct and the absence of any strong counterveiling policy.

3. THE COURT OF APPEALS ERRED IN FAILING TO RECOGNIZE THAT THE INSTANT SEARCH AND SEIZURE WERE PROPERLY CONDUCTED PURSUANT TO A LAWFUL ARREST.

It is the State's position that Mr. Wright failed to fully and completely describe his place of residence to local police authorities thereby furnishing false and misleading information in violation of *N.J.S.* 2A:169A-7 and 8.[4] This violation constituted a continuing offense committed in the presence of the arresting officers. *State v. Morse*, 54 *N.J.* 32 (1969), 252 *A.* 2*d*-723, affirming 106 *N.J. Super.* 1 (App. Div. 1968), 254 *A.* 2*d*-109.

Respondent had represented on his narcotics registration that he was residing in Apartment No. 7. Since he was recognized as the person undressed and in bed in apartment No. 8, the plainly reasonable inference was that respondent lived in apartment No. 8 and had either failed to change his place of residence or had given false information from the beginning. The police officers lawfully arrested him for the violation and searched his one-room apartment incidental to that arrest. *Abel v. United States, 362 U.S. 217, 80 S. Ct. 683, 4 L. Ed. 2d 668, (1960)*, reh. den. 362 *U.S.* 984, 80 *S. Ct.* 1056, 4 *L. Ed.* 2*d* 1019. The court below erred in failing to recognize the validity of the search and seizure.

[4] *N.J.S.* 2A:169A was entitled "Registration of Persons Convicted of Certain Offenses." The import of the statutes under this chapter was to supply notification to government authorities of the whereabouts of narcotics offenders. The required information to be furnished (N.J.S. 2A:169A-2) was set out in *N.J.S.*2A:169A-1. It included: ". . . a full and complete description of (the offender), the place of his birth and his present residence . . . the address or location of his intended residence stopping place or living quarters . . . describing the same by description and street number, if any, in such manner as to identify the same." It was the State's position in the Court of Appeals that apartment number is part of street number and, in any event, respondent failed to accurately describe his residence so as to identify it.

N.J.S. 2A:169A was repealed on June 23, 1971, after the offense in question was committed.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted.

JOSEPH P. LORDI
ESSEX COUNTY PROSECUTOR

R. BENJAMIN COHEN
ASSISTANT PROSECUTOR
Counsel for Petitioner
Essex County Courts Building
Newark, New Jersey 07102

SARA A. FRIEDMAN
ASSISTANT PROSECUTOR

On the Petition

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1157

UNITED STATES OF AMERICA, ex rel.
ARTHUR WRIGHT, JR., No. 48465

v.

STATE OF NEW JERSEY,

Appellant

D.C. Civil Action No. 893-71

Appeal from the United States District Court for the District of New Jersey

Argued February 6, 1973
Before BIGGS and GIBBONS, *Circuit Judges*, and HUYETT, *District Judge*

Joseph P. Lordi
Joseph A. Fusco
Attorneys for Appellant

Stanley C. Van Ness
Thomas E. Bracken
Attorneys for Appellee

OPINION OF THE COURT
(Filed MAR 1, 1973)

PER CURIAM

This is an appeal by the State of New Jersey from an order granting a petition for a writ of habeas corpus in the United States District Court for the District of New Jersey. Appellee Wright had been convicted in the Essex County Court for the unlawful possession of narcotics in violation of N.J.S.A. 24:18-4, which conviction was affirmed by the Appellate Division of the New Jersey Superior Court, and the State Supreme Court denied certification.

After carefully reviewing the record and the briefs, and hearing oral argument, we conclude that the State's contentions are without merit and that the writ was properly issued.

The order of the district court will be affirmed.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1157

UNITED STATES OF AMERICA, ex rel.
ARTHUR WRIGHT, JR., No. 48465

v.

STATE OF NEW JERSEY,

Appellant

D.C. Civil Action No. 893-71)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT

FOR THE ----- DISTRICT OF NEW JERSEY

Present: BIGGS, and GIBBONS, Circuit Judges and HUYETT, District Judge

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ----District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed December 23, 1971, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

THOMAS P. QUINN
Clerk

March 1, 1973

APPENDIX "C"

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA
ex rel. ARTHUR W. BRADY, JR.,
Petitioner,

Civil Action
No. 893-71

vs.

STATE OF NEW JERSEY,
Respondent.

MEMORANDUM
and
ORDER

AUGELLI, Chief Judge.

This is a pro se application to filing petitioner, for a writ of habeas corpus. Petitioner is presently in state custody, serving a prison term of 3 to 5 years imposed upon him by the Essex County Court on November 22, 1967, following his conviction by a jury for unlawful possession of narcotics contrary to N.J.S.A. 24:18-4.

Petitioner challenges the legality of his confinement, alleging that his federal constitutional rights have been violated in the following particulars:

1. That no probable cause existed for the issuance of a search warrant.

2. That the execution of the search warrant violated the Fourth Amendment.

3. That it was error for the trial court, sua sponte, to give the jury a supplemental charge, and

4. That the narcotics registration law, N.J.S.A. 2A:169A-1, is unconstitutional.

Petitioner has exhausted his state remedies as to contentions 1, 2 and 3, and only those grounds are before the Court for consideration.

Pursuant to 28 U.S.C.A. § 636 (b) (3) and General Rule 40E (3) of this Court, this matter was referred to The Honorable John W. Devine, United States Magistrate, for preliminary review and report and recommendation regarding the necessity for an evidentiary hearing with respect to the merits of petitioner's contentions. The Magistrate has filed his report wherein he states that the record in this case permits a resolution of the issues raised in the state courts without an evidentiary hearing. Additionally, the Magistrate has recommended that a writ of habeas corpus issue for the reason that no probable cause existed for the issuance of a search warrant in this case. As to the other grounds asserted for relief, the Magistrate reported that they were without merit. In passing, it is to be noted that the case of UNITED STATES v. HARRIS had not yet been officially reported when the Magistrate prepared his Report, hence the references therein to the slip opinion. HARRIS is now reported in 403 U.S. 573.

An independent review, in compliance with the mandate of TOWNSEND v. SAIN, 372 U.S. 293 (1963), has been made of the pleadings, briefs, and state court records in this case, as well as the Report and Recommendation submitted by the Magistrate. The Court is in complete agreement with the Magistrate's Report and Recommendation and is satisfied, as a result of the independent review made of the record, that the affidavit pursuant to which the search warrant in this case was issued, was insufficient in law to establish probable cause. In an Amended Answer filed by respondent the Court's attention is called to the case of STATE v. MACK, 114 N.J. Super. 513 (App. Div. 1971), which held that an affidavit, similar to the one involved in this case, provided an adequate basis for a finding of probable cause and issuance of a search warrant. With all due deference to the learned judges who decided MACK, this Court is not persuaded that the MACK holding should apply here.

It is therefore, on this 23rd day of December, 1971,

ORDERED, that the Report and Recommendation of Magistrate Devine, annexed hereto, be and the same hereby is adopted as the opinion of this Court; and it is further

ORDERED, that U. Samuel Vukcevich, Esquire, who has custody of petitioner as Warden of the State Prison Farm in Rah-

way, New Jersey, be and he hereby is made an additional party respondent to these proceedings; and it is further

ORDERED, that a write of habeas corpus issue; execution of said writ being hereby stayed for a period of thirty (30) days from the date hereof pending a decision by respondent State of New Jersey to either grant petitioner a new trial or to effect his immediate release from custody; and it is further

ORDERED, that true copies of this Memorandum and Order be served by the United States Marshal upon the Prosecutor of Essex County and respondent U. Samuel Vukcevich at the Rahway State Prison Farm, Rahway, New Jersey, within ten (10) days from the date hereof.

ANTHONY T. AUGELLI
United States District Judge

TO THE CLERK OF THE COURT:

Please file as Court exhibits the following:

P-1. Copy of defendant-appellant's Brief and Supplemental Appendix.

P-2. Copy of opinion of Appellate Division.

R-1-1. Copy of transcript of proceedings before Judge Colarusso on September 24, 1969.

R-1-2. Copy of transcript of proceedings before Judge Colarusso on October 7, 1969.

R-1-3. Copy of transcript of proceedings on October 8 and 9, 1969.

The "P" exhibits in due course should be returned to petitioner. The "R" exhibits should be returned to the Essex County Prosecutor.

ANTHONY T AUGELLI
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
DOCKET No. C. 893-71

UNITED STATES OF AMERICA
ex rel.
ARTHUR WRIGHT, JR.,
PETITONER,
V.
STATE OF NEW JERSEY,
RESPONDENT

Civil Action
(On Petition for Writ of Habeas Corpus)

REPORT AND RECOMMENDATION

Arthur Wright, Jr. has filed a petition for habeas corpus pro se which has been referred under our General Rule 40E (3). 28 U.S.C.A. § 2241 et seq.

On October 30, 1968 a warrant to search "premises of Arthur Wright, Elsie Sampson known and designated as No. 12 Chestnut St. Apt. No. 7" was issued by a magistrate of Newark upon the affidavit of Detective Petrillo of that city. The affidavit recited that the deponent had

> "received information from reliable sources and also from an informer who has proved reliable in the past that (petitioner), Narcotic Registrant number 1258 and Elsie Sampson, NR No. 414 are selling narcotics from . . ."

the aforesaid apartment. In addition Detective Petrillo averred that on October 26, 28 and 29 he and three other officers had observed known narcotic addicts enter and leave 12 Chestnut St.; no apartment however was designated.

Armed with the warrant the police went to 12 Chestnut St. which is a multi-family dwelling of at least three stories. According to the testimony of Detective Decker and Gockeler who accompanied Detective Petrillo who did not testify, the door to apartment 7 faced them as they walked to the front of the second

floor of 12 Chestnut Street. About three feet to the left and facing in the same direction was the door to apartment 8. The door to apartment 7 was closed and the officers did not attempt to enter it then or later. The reason, they testified, was that the door to apartment 8 was then opening into that dwelling, although they saw no one touching it and felt no breeze. Entering apartment 8 they found its occupants to be petitioner and Elsie Sampson. They then served petitioner with a copy of the warrant. The officers next searched the premises which comprised one room for 30 minutes. They found a bottle of narcotics theretofore unseen by them on top of a dresser and a glassine envelope of heroin in its top drawer together with $192.39.

Petitioner and Elsie Sampson were arrested and charged with illegal possession of narcotics in violation of N.J.S.2A:18-4. They were jointly indicted in Essex County for possession of heroin (I-971-68) and Methodone (I-972-68). He was found guilty on the former, acquitted on the latter and sentenced to serve three to five years. Miss Sampson pleaded guilty to I-972-68 and received an indeterminate sentence. Her trial on I-971-68 was severed.

On appeal the Superior Court of New Jersey, Appellate Division, affirmed petitioner's conviction in an Unpublished opinion. A-701-69. The State Supreme Court denied certification, 58 N.J. 164 (1971). This petition followed.

Contentions I, II and III were all raised in the New Jersey Courts by petitioner and as to them he has exhausted his state remedies. 28 U.S.C.A. § 2254 (b), *Fay v. Noia,* 372 U.S. 391 (1963). As noted below the same is not true of contention IV.

Petitioner's initial contention is that probable cause did not exist for the issuance of the search warrant. We agree.

The latest guide through the maze of probable cause is *United States v. Harris,*_____U.S._____decided June 28, 1971 in a five to four decision. Justice Harlan, writing for the dissenters, found that the majority concurred "for four separately expressed reasons". The facts in *Harris* are of no particular relevance here. Its teaching, however, certainly is.

In *Harris* the Court "granted certiorari . . . to consider the recurring question of what showing is constitutionally necessary to satisfy a magistrate that there is a substantial basis for crediting the report of an informant known to the police, but not identified to the magistrate, who purports to relate his personal

knowledge of criminal activity." This language without more implicity demonstrates the Court's reaffirmation, if one were necessary, of the requirement that an affidavit of probable cause recite what an informant "purports (to be) his personal knowledge of criminal activity" as opposed to his mere conclusion. There the informant had purchased narcotics from the petitioner within the two weeks immediately preceding the giving of the affidavit. In the affidavit challenged in this Court there is not even a suggestion of the informant's personal knowledge. All that is said in this regard is that "reliable sources and . . . an informer who has proved reliable in the past" reported that petitioner and Elsie Sampson are selling narcotics from their apartment, No. 7, nothing more. The deficiency is critical.

It is of course beyond dispute on this record that petitioner and Elsie Sampson lived in apartment 8, not 7. The remainder of the affidavit discloses that known narcotic users were observed entering and leaving the building in which petitioner and Elsie Sampson were living. For aught that appears, however, the known narcotic users meandered the halls or visited any one of the at least seven other apartments located at 12 Chestnut Street. In short this affidavit contains nothing by way of "independent corroboration of the informant", *United States v. Harris*, supra at page 3 of the Slip Opinion.

We recognize that the affidavit sets forth its deponent's knowledge of petitioner as a narcotic registrant and that in *Harris* the Court ruled that a magistrate "may properly rely (thereon) in assessing the reliability of an informant's tip." Slip Opinion, page 9. But in *Harris* the informant's personal knowledge was set forth. Here there is no such disclosure. Furthermore the deponent's knowledge of petitioner as a narcotic registrant is not equivalent to a belief that he is a *seller* of narcotics. On balance the instant affidavit more closely resembles those found wanting in *Spinelli v. United States*, 393 U.S. 410 (1969) and in *Aguilar v. Texas*, 378 U.S. 108 (1964) rather than those found adequate in*Harris*, supra and in *Jones v. United States*, 362 U.S. 257 (1962). This conclusion is compelled, we believe, by appraising this affidavit "in a common sense and realistic fashion", *United States v. Ventresca*, 386 U.S. 102 (1965), quoted with approval in *Harris*. Slip Opinion, page 3.

It is stating the obvious, we believe, to mention that a narcotic registrant who occupies an apartment in a multi-family

dwelling does not thereby render his residence subject to a search should known narcotic users enter and leave the building.

We note further that the affidavit here did not give the magistrate any reason for the deponent's characterization of the informant as reliable.

The Appellate Division however held that the petitioner had waived the issue of probable cause. The background for that conclusion follows.

A motion to suppress the fruits of the search was made by the attorney for Elsie Sampson before trial as required by New Jersey Rule 3:10-2. At the outset of that hearing petitioner's attorney advised the court that he had

> "been recently assigned by the Public Defender's office to defend (petitioner) and in view of the lateness of (his) assignment . . . would like to join in the motion . . ."

which was then pressed by counsel for the co-defendent only on the ground that the officers had no authority to enter apartment 8 because the warrant on its face was directed to apartment 7.

After testimony on the motion was concluded the attorney for Elsie Sampson made a closing argument in which no mention was made of probable cause.

In his own argument, which followed that of Elsie Sampson's attorney, petitioner's counsel said,

> ". . . and we have to assume since the affidavit isn't being attacked, that there was a valid search warrant and (that) there were grounds for a search warrant . . .".

Petitioner's counsel, therefore, and perhaps understandably in view of his recent entry into the case, assumed the existence of probable cause.

Although the suppression motion was argued on September 24, 1969 and the trial was held on October 7, 8 and 9, 1969 counsel for petitioner made no objection to the search and seizure at the latter proceeding. R.3:10-2 of the New Jersey Rules of Court, however, does not permit such a motion at trial.

Waiver is the intentional relinquishment of a known right, *Johnson v. Zerbst*, 304 U.S. 458 (1938). To be effective "it must be the 'considered choice of the petitioner *** a choice made by counsel not participated in by the petitioner does not

automatically bar relief". *Fay v. Noia*, 372 U.S. 391, 439". *United States ex rel. Snyder v. Mazurkiewicz*, 413 F. 2d 500 (3 Cir. 1969). Petitioner here can hardly be held to have waived his right to raise an issue the merits of which were assumed from the conduct of another's attorney, especially where his assigned counsel had only lately entered the lists.

It is also apparent that petitioner's attorney did not deliberately waive this issue in order to gain a tactical advantage. Indeed in the circumstances of this case no such advantage was possible much less likely. Cf. *Henry v. Mississippi*, 379 U.S. 443 (1965); *United States v. Di Rienzo*, 443 F.2d 228 (3 Cir. 1971).

Under 28 U.S.C.A. § 2254 (d) the findings of a state court on the merits of a factual issue made after a full and fair hearing are presumed to be correct. Probable cause and waiver however are legal not factual issues and this Court is required to make its own determination as to each. *Townsend v. Sain*, 372 U.S. 293 (1963).

It is our conclusion, based upon *United States v. Harris*, supra, that probable cause did not exist for the issuance of this warrant. It follows that the introduction of the evidence obtained was unconstitutional. *Mapp v. Ohio*, 367 U.S. 643 (1961). The nature of the charge and the evidence leave no room to question the devastating effect of the latter.

After the conviction now before us, petitioner was convicted of a second violation of N.J.S.24:18-4 for which he was sentenced to serve five to seven years consecutive to the instant term. In that case petitioner was represented by the attorney who defended him in the case at bar. On appeal the Appellate Division reversed on the ground that probable cause did not exist for the issuance of the search warrant in the execution of which narcotics were discovered at his residence, then the top floor of 203 Spruce Street, Newark. A pre-trial motion to suppress had been denied. The supporting affidavit in that case is remarkably similar to that here and coincidentally was given by Detective Petrillo. *State v. Wright*, Docket No. A-1577-69, decided June 14, 1971. The Supreme Court of New Jersey granted certification on September 21, 1971.—N.J.—, see 113 N.J. Super. 79. See also *State v. Ebron*, 113 N.J. Super. 152 (App. Div. 1971) in which the Appellate Division reversed the defendant's conviction for lack of probable cause and the State Supreme Court granted certification. 58 N.J. 333 (1971). In that case the affidavit was given by Detective

Gockeler and follows Detective Petrillo's in form and in substance.

II

Petitioner next contends that the execution of the warrant violated the Fourth Amendment. That warrant designated apartment 7; the police on their own testimony entered and searched only apartment 8. Apartment 7 was designated as petitioner's residence because that was the address given by him and Miss Sampson when they registered as narcotic users. Here again it is apparent that whatever the practical problem the surveillance of 12 Chestnut Street was not sufficiently thorough. The testimony at trial was that petitioner and Miss Sampson never lived in apartment 7 and always lived in apartment 8 while at 12 Chestnut Street. It is stating the obvious to note the absence of proof that the narcotic users mentioned in the affidavit as purchasing drugs from petitioner and Miss Sampson did so in apartment 7.

In its findings on the motion to suppress the court characterized the designation of apartment 7 as an "unintentional error" and so it was on the part of the police. In the circumstances however we think that designation was also a "suspect induced error."

The police did not see any contraband before they entered apartment 8, did not then know that its occupants had not given their correct apartment number when they registered as narcotic users and did not ask to be admitted to apartment 7. In his original answer, unchanged by an amended pleading, the respondent alleges "that the state never relied upon *the fact that the search was incident to a lawful arrest*". (Emphasis added). On this record the emphasized conclusion is unwarranted.

The Fourth Amendment proscribes unreasonable searches and seizures. This warrant was directed to a portion of a multi-family dwelling, that occupied by petitioner and Elsie Sampson. To that extent the designation of a particular apartment by number as opposed to occupant was surplusage. In the specific context of this case, including the fact that petitioner and Elsie Sampson had both registered their apartment as No. 7 when in fact they lived in No. 8, and that those apartments adjoined each other we do not find the execution of this warrant unreasonable, probable cause aside.

Our finding here is, of course, academic in view of the conclusion reached above on the issue of probable cause.

III

After the jury had been deliberating for about five hours the trial court, sua sponte, gave a supplemental or Allen charge. The jury returned its verdict of guilty on I-971-68 and not guilty on I-972-68 in approximately two hours. Based on those events petitioner alleges a violation of his Sixth Amendment right to a jury trial.

The prohibition in this Circuit against the Allen charge obtains only "to charges given after June 16, 1969, in federal court trials . . .". Here the charge was given after June 16, 1969 but the trial was of course in a state court. *United States ex rel. Brothers v. Rundle*, 414 F.2d 244 (3 Cir. 1969).

There is no merit to this contention. Cf. *Fioravanti v. United States*, 412 F.2d 407 (3 Cir. 1969), c.d.—U.S.— (1969), 90 S. Ct. 97.

IV

By supplemental pleadings petitioner also contends that the narcotic registration law, N.J.S.2A:169A-1, is "constitutionally unsound"; and that his attorney should have objected to the admission in evidence of a substance seized in apartment 8, which was stipulated to be heroin and should not have advised him not to testify. These issues have not been raised in the New Jersey Courts and therefore as to them petitioner has not exhausted his state remedies. 28 U.S.C.A. §2254 (b). Accordingly they are not properly before us.

Petitioner has named the State of New Jersey as respondent herein rather than U. Samuel Vukcevich in whose custody he is. Accordingly the petition should be amended to comply with 28 U.S.C.A. §2242.

In view of the foregoing we recommend that the petition be granted and the writ issue. Ordinarily we would qualify this recommendation by suggesting that the petitioner not be discharged for 90 days in order to permit the State to retry him without resort to the illegally seized evidence. In view of the relation of the constitutional shortcoming to the charge such a cause would serve no purpose here.

The record[1] at hand permits resolution of the petition without an evidentiary hearing. *Townsend v. Sain*, 372 U.S. 293 (1963).

Respectfully submitted,

Dated: **John W. Devine**

[1] **The following exhibits have been received:**

P-1: Petitioner's brief and supplemental appendix on direct appeal.

P-2: Superior Court of New Jersey, Appellate Division Opinion, *State v. Wright*, Docket No. A-701-69.

Transcript of suppression motion, *State v. Wright et al.*

R1-1: Transcript of suppression motion, *State v. Wright et al.*

R1-2: Trial transcript, *State v. Wright*, October 9, 1969.

R1-3: Trial transcript, *State v. Wright*, October 8 and 9, 1969.

APPENDIX "D"

SUPREME COURT OF NEW JERSEY
C-357 September Term 1970

State of New Jersey, **Plaintiff-Respondent,** **vs.** **Arthur Wright, Jr.,** **Defendant-Petitioner.**	**On Petition for Certification**

To Appellate Division, Superior Court: A petition for certification having been submitted to his Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 30th day of March, 1971.

IRVING B. ZEICHNER
Acting
Clerk of the Supreme Court

APPENDIX "E"

STATE OF NEW JERSEY PLAINTIFF-RESPONDENT, v. ARTHUR WRIGHT, JR., DEFENDANT-APPELLANT

Superior Court of New Jersey
Appellate Division

Argued January 12, 1971—Decided January 21, 1971.

Before Judges KILKENNY, HALPERN and LANE.

Mr. Peter N. Perretti, Jr., Assigned Attorney, argued the cause for appellant.

Mr. R. Benjamin Cohen, Assistant Prosecutor, argued the cause for respondent (*Mr. Joseph P. Lordi*, Essex County Prosecutor, attorney; *Mr. David s. Baime*, Assistant Prosecutor, of counsel).

The opinion of the court was delivered by

HALPERN, J. A. D. Defendant was convicted by a jury of the unlawful possession of narcotics (N.J.S.A. 24:18-4), and appeals from the judgment of conviction. The issues will be considered in the order presented in defendant's brief.

I

Defendant contends the court erred in not suppressing the evidence seized because (a) the warrant for the search was issued without a sufficient showing of probable cause, and (b) the warrant was improperly executed.

(1) Defendant had been jointly indicted with Elsie Sampson. At the joint hearing on their motions to suppress, counsel for Sampson advised the court that no attack was being made on the sufficiency of the proofs for the issuance of the warrant. We find from the record that defendant and his attorney (not assigned counsel on this appeal) acquiesced therein. Defendant's attorney made no objection to the admission by Sampson's attorney; at the hearing he offered no argument or testimony to attack the sufficiency of the proofs in support of the warrant, and

in summation at the suppression hearing he stated that "we have to assume since the affidavit isn't being attacked, that there was a valid search warrant, and there were grounds for a search warrant, at least to make a search, * * *." The sufficiency of the proofs to support the issuance of the warrant having been voluntarily admitted, the defendant has waived his right to now attack it on appeal. *State v. Di Rienzo*, 53 N.J. 360, 384 (1969); *Oradell Village v. Wayne Tp.*, 101 N.J. Super. 403 (App. Div. 1968), aff'd 53 N.J. 496 (1969). As we noted in *Abel v. Elizabeth Bd. of Works*, 63 N.J. Super. 500, 510 (App. Div. 1960), "the object of an appeal is to correct errors properly noted below — not to retry a case."

(2) We turn to the issue concerning the execution of the warrant. The warrant authorized a search for narcotics "concealed in the premises of Arthur Wright, Elsie Sampson known and designated as 12 Chestnut Street, Apt. No. 7, in the City of Newark, Essex County, New Jersey." The trial judge found from the proofs at the suppression hearing that the place to be searched was properly designated because defendant and Sampson were narcotic offenders who had registered as such in compliance with *N.J.S.A.* 2A:169A-1, and had designated Apt. No. 7 at 12 Chestnut Street as their present address. The fact that the police, in executing the warrant, saw defendant in Apt. No. 8 as they were approaching Apt. No. 7 and arrested and searched him in Apt. No. 8 does not invalidate the search.

(3) The Fourth Amendment to the United States Constitution and Art. 1, par. 7 of the New Jersey Constitution do not forbid all searches and seizures; they forbid only unreasonable searches and seizures. *Elkins v. United States*, 364 U.S. 206, 80 S. Ct. 1437, 4L. Ed. 2d 1669 (1960). When a search is made pursuant to the authority of a warrant, it is preferentially treated and is presumed valid and the burden of establishing its invalidity is upon the defendant. *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964); *State v. Mark*, 46 N.J. 262, 273 (1966). The warrant will be held to sufficiently describe the place to be searched if the officer with the warrant can with reasonable effort ascertain and identify it. *State v. Daniels*, 46 N.J. 428, 435-437 (1966); *State v. Medero*, 95 N.J. Super. 209 (App. Div. 1967); *State v. Ferrara*, 98 N.J. Super. 534 (App. Div. 1968); *State v. Sheppard*, 46 N.J. 526 (1966). If the sufficiency of a warrant is

marginal, the search will be held valid. *United States v. Ventresca*, 380 U.S. 102, 109, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965); *State v. Kasabucki*, 52 N.J. 110, 118 (1968). Applying these standards to the facts appearing in the record before us, we agree with the trial judge that the misdescription of the apartment to be searched resulted from the defendant's own wrongful act. The unintentional error by the police in designating the apartment occupied by defendant and Sampson as Apt. No. 7 as the place to be searched was rationally explained. *State v. Daniels*, *supra*, 46 N.J. at 438. Neither the Federal and State Constitutions nor fundamental justice require this otherwise valid search and seizure to be set aside.

II

(4) Defendant contends that certain volunteered answers given by two police officers by inadvertence informed the jury of his prior criminal difficulties. At the outset we point out that when the alleged offensive answers were given the court immediately struck them and charged the jury to disregard them. No motion was made for a mistrial. We have examined the record and find no prejudicial error in this regard. *State v. Layton*, 103 N.J. Super. 470 (App. Div. 1968), certif. den. 53 N.J. 351 (1969).

III

(5) Defendant contends he was prejudiced by an improper comment made by the assistant prosecutor. At the conclusion of the State's proofs the following exchange took place:

MR. FRANCIS: Your Honor, I have no further witnesses. The additional two men who were in this particular apartment would only be repetitive of the testimmny developed. However, in resting I will make these witnesses available to the defendant.

MR. GROSSMAN: Your Honor, I don't think it is necessary for the prosecutor to make a speech to the Court. If he wants to call them as his witnesses, let him call them as his witnesses.

THE COURT: Well, he indicated to the Court that he has no need for them as their testimony would only be cumulative.

MR. GROSSMAN: It's for the jury to conclude, your Honor, not on his representation that they would testify the same way.

Considering this exchange in context of the discussion, no prejudicial error occurred warranting a new trial. *State v. Hipplewith*, 33 N.J. 300, 320 (1960).

IV

(6) Finally, defendant contends it was plain error for the court to recall the jury on his own initiative after they had been deliberating for about five hours and give them a so-called "Allen charge." We have carefully reviewed this supplemental charge and find it fully comported with the mandate in *State v. Williams*, 39 N.J. 471, 484 (1963), cert. den. 374 U.S. 855, 83 S. Ct. 1924, 10 L.Ed. 2d 1075 (1963). There was no error, let alone plain error.

Considering the record as a whole, we are satisfied defendant received a fair trial.

Affirmed.